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No. 92-1600

In The
The Supreme Court of the United States
October Term, 1992

THE PARSONS CORPORATION AND
THE RALPH M. PARSONS COMPANY,
Petitioners,

v.

STATE OF ALASKA, DEPARTMENT OF REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF

1. DOR Wrongly Accuses Engineer Of Misstating The Record On A Crucial Point.

In their Opposition brief (at footnote 4) the Department of Revenue (DOR) peremptorily states that Petitioners (The Parsons Corporation and subsidiaries, hereafter "Engineer") "mischaracterized" key stipulated facts. Ordinarily, differences over stipulations would not be worthy of mention, but DOR's attack goes right to the heart of this case -- agency and a tax adjudicative process riddled with conflict of interest.

First, as stated by the Alaska Supreme Court (hereinafter the "Alaska Court"), agency is the controlling legal issue of the case:

> The income tax results in this case depend upon the classification of [Engineer's] business activity. If [Engineer] acted as manufacturer and seller of oil field modules its revenues were 'for the sale of tangible personal property.' If [Engineer] acted as a contractor who procured materials as a purchasing agent and was paid for skills and services provided, its revenues were from the sales of tangible personal property. (App. to Pet. at 7a).

The challenged stipulated facts on equitable ownership and control are central to the controlling inquiry of whether Engineer is a manufacturer or service provider/purchasing agent. This determination depends upon a legal analysis of all of the facts describing the relationship between Engineer and its client, OILCO.

DOR cites as the principal example the emphasized portion of Petition's Fact number 7; specifically, "OILCO could compel Engineer to transfer any procured materials anywhere, even another state *or country, without additional compensation, because the parties regarded the materials as always owned by OILCO."*

This statement, summarizes the uncontradicted affidavits annexed to and incorporated into the stipulation, which provide:

> [OILCO] could compel [Engineer] to transfer materials procured by [Engineer] to any other location ... because ... [OILCO and Engineer] considered all procured materials as owned by [OILCO] and therefore subject to [OILCO] control. File 1 at 69.
>
> From approval and review of the initial requisition to ultimate approval or disapproval of [purchase of materials, OILCO] has final say on how, from whom, how much, when and under what terms the materials acquisition occur. Finally, [OILCO], could as a practical matter and under the terms of the contract, request [Engineer] to transfer any property procured under the above procedures in which [Engineer] held title to [OILCO]. File 1 at 67.
>
> [M]aterials ... were procured on [OILCO's] behalf and were beneficially owned by [OILCO]; and [OILCO] at all times controlled every aspect of the acquisition and disposition of the procurement process. File 1 at 58.

The record fully supports Engineer's summary and none of DOR's objections are meritorious.

2. DOR's Claim That The Alaska Court Used An Independent Judgment Standard Of Review Is Not Credible

Despite DOR's argument at pages 8 and 15, the Alaska Court actually used the so called reasonable basis standard of review. The court specifically says, "In the present case, the reasonable basis test applies." and goes on to explain why. App. at 6a. In response, however, to

Engineer's petition for rehearing, the Alaska Court withdrew its first opinion and (among other things) added the present footnote 3. App. at 8a-9a. This footnote quoted DOR's recitation of the few facts superficially inconsistent with agency, discusses none of the facts dictating an agency conclusion, and tosses DOR the clause, "After reviewing the record, and using our independent judgment, we agree with DOR's decision on this issue." A. at 8a, n. 3. This is just lip-service to Engineer's constitutional rights. The Alaska Court's *dictum* in Footnote 3 (added solely in response to Engineer's request for a rehearing, which was denied) does not alter the holding and conclusion that the Alaska Court will not reverse DOR so long as DOR has a "reasonable basis" for its decision. As indicated in Engineer's petition for rehearing, this results in an unconstitutional delegation of adjudicative authority to the DOR with its conflict of interest and deprives Engineer of due process.

DOR argues that it was acceptable for the Alaska Court to invoke a "reasonable basis" of review of the Department's decisions and asserts that it does not always win in the Alaska Supreme Court. This issue is important because of the conflict of interest that the Commissioner of the DOR has between his responsibility to raise money for the state's operations and his role as final decision maker on agency administrative reviews of taxpayer challenges.[1]

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[1]DOR argues that Parsons incorrectly denominates the informal conference procedure a "hearing" and that the procedure is better characterized as a pre-litigation settlement conference. Respondent's Brief, p. 6. The DOR's informal proceeding is very different from a "settlement conference." Pursuant to statute and regulation, the informal conferee makes formal findings which are embodied in a decision which is what is reviewed at the formal hearing. As DOR itself states, the DOR "issued its informal hearing decision....[in which] DOR denied each of [Engineer's] claims. with respect to issues raised by Engineer....[Engineer] timely appealed the informal decision of the

Without an independent judgment standard of review, the procedure violates due process.

It is important to note that Engineer is only complaining of the Commissioner's conflict of interest when it is coupled with a highly deferential standard of review, such as the reasonable basis standard.

One indication of the results of the unconstitutional conflict of interest in the Alaska system is the DOR's success rate before the Alaska Court. The IRS would be green with envy at DOR's success ratio compared to IRS's record before this Court (and the United States Tax Court), and IRS rarely has to face Constitutional issues. DOR could find only one *unpublished* income tax case for the proposition that it does not always win income tax cases in the Alaska Supreme Court -- *F. W. Woolworth Co. v. State*, No. 101 (Alaska filed Oct. 29, 1981) [attached as App. hereto] -- a case mooted by this Court when it was still under consideration by DOR upon remand from the Alaska Court.

In *Woolworth* the issue was whether dividends from Woolworth's foreign subsidiaries were unitary income because Woolworth and its subsidiaries were engaged in a unitary business; the Alaska Court remanded for additional evidentiary hearings; in the interim, this Court held that Woolworth's subsidiaries were not unitary and DOR dropped the case. *F. W. Woolworth Co. v. Taxation and Revenue Dept. of New Mexico*, 458 U.S. 354 (1982). This hardly contradicts the fact that Alaska has created a system in which the DOR never loses.

DOR for a Formal Hearing..." File 1 at 4. In this case the DOR gave great weight to the informal conference "decision" and issued a Formal Hearing Decision which essentially tracks the informal decision.

DOR aggressively asserts that despite its unblemished success record in the Alaska Court, a statistical success rate "means nothing" and that the pattern of continual success does not demonstrate discrimination against out-of-state taxpayers. DOR misses the point of citation to these cases. Engineer agrees that it takes more than just statistics to show a deprivation of due process, and Engineer has done so by showing the DOR Commissioner's conflict of interest which is rubber stamped by the Alaska Court's "reasonable basis" standard. One cannot accurately analyze the other Alaska cases from the Alaska Court's opinions; nevertheless, during the thirty-five years since Alaska attained statehood one would have expected some taxpayer to win.

As shown by the severe distortion of the facts stated in the Alaska Court's opinion in this case, the court omits crucial facts inconsistent with its decision. It is respectfully submitted that if its other opinions similarly denude the underlying facts of their efficacy, it is impossible to verify the assertion that the DOR in fact "weeds out weaker cases" as it contends. It also makes it difficult, if not forbidding, for this Court to perform its role in protecting constitutional rights.

3. The Constitution Limits A State's Choice-Of-Law; Alaska's Rejection of California Law Raises Federal Questions

The Alaska Court violated Engineer's due process rights by creating new Alaska agency law and not applying California's agency law on the crucial issue of agency. Engineer's opening briefs to both the Alaska Superior Court and the Alaska court each clearly argue that California law is the governing law on the ultimate question of agency. DOR, however, side-steps these arguments by positing the proposition that the choice-of-law issue is a

"common law" issue and therefore is not a federal constitutional issue.

Choice of law criteria are inherently grounded in constitutional law. Choice-of-law questions are about the allocation of authority among the several states. Allocation of authority is what constitutions do. The essential function of our Constitution is to constitute the many units of government in our federal system and define and limit the power of each. It would be an astonishing oversight if our fundamental law did not state general principles allocating authority to and among the states and if those principles did not have implications for choice-of-law. *Phillips Petroleum v. Shutts*,[2] 472 U.S. 797 (1985), *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981) and *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930) explore the positive constitutional bases for choosing among competing intuitions about the limits of state authority and for providing federal answers to choice-of-law questions.

4. Engineer Properly Preserved Its Federal Issues

DOR argues (at page 10) that this Court does not have jurisdiction because Parsons did not raise a federal question prior to the Alaska Court's offending actions; however, before the Alaska Court's original opinion, there was no federal issue. As distasteful as the conflict of interest between the Commissioner's primary duty to raise money for the state and his or her veto power over administrative adjudications, Engineer did not feel that it rose to a due process violation so long as the facts were stipulated (as here) and an independent judgment standard of review applied to the legal issue of whether Engineer was an agent or a seller (as both sides argued). Prior to the Alaska

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[2]DOR incorrectly argues that *Shutts* turns on nexus.

Court's original opinion there was no call to anticipate that the court would not fairly articulate the stipulated facts, would not follow the agreed standard of review, and would ignore the agreed law of the contract and concoct special Alaska agency law to increase Engineer's taxes. In fact, it would have been presumptuous to have anticipated that the court would do so.

As soon as the Alaska Court stated in its original opinion that it would not reverse the DOR's decision unless the decision lacked a reasonable basis under the "reasonable basis standard," Engineer raised the constitutional issues in its petition for rehearing. This was all Engineer was required to do. *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

In answer to DOR's criticism at page 8 that the argument was terse, Alaska has a five page limit for petitions for rehearing (See Alaska Supreme Court Rule 506) and the Alaska Court made several other mistakes (some of which it corrected in its reissued opinion).

In Engineer's Petition for rehearing before the Alaska Court, Engineer demonstrated that (a) the Alaska Court relied on an a regulation that was not even effective for the years in question (corrected in the reissued opinion); (b) omitted all authority cited by the parties on the agency issue (including controlling California authority, not corrected); (c) omitted all facts cited by the Superior Court and Engineer that were central to the agency determination (not corrected); and, (d) applied an improper standard of review, contrary to that stipulated by the parties (specifically the independent standard of review; not corrected, see below). Therefore Engineer's Petition For Rehearing before the Alaska Court, argued that failure to address these issues constituted a denial of Engineer's right to due process and unduly burdened interstate commerce.

In a revised opinion in response to Engineer's Petition for Rehearing, the Alaska Court removed reliance on the regulation and added the footnote giving bare lip-service to Engineer's agency argument contending, "In determining that [Engineer] was not [OILCO's] agent, DOR carefully examined the facts of the present case, and compared these to relevant authority. After reviewing the record, using our independent judgment, we agree with DOR's decision on this issue." App. at 8a.

DOR argues that if this Court accepts Engineer's argument "any state court decision would be subject to review." Respondent's brief at 14. To the contrary, first, the case has to involve a deprivation of life, liberty or property by the State, an undue burden on interstate commerce, a denial of equal protection of the law, or some similar foundation. The vast majority of state cases have no such foundation. Second, a state court determining state issues would only be subject to review if it omits virtually every material fact cited by the lower court in reaching its decision such that the opinion rendered does not resemble the case argued. Again, this is mercifully rare. If this Court does not follow such a standard, state courts could easily avoid this court's correction of their violations of federal rights. It is analogous to state court's attempts to avoid this court's review by concocting untenable state grounds. See, *Osborne v. Ohio*, 495 U.S. 103, 125 (1990). Whether it eventually wins or looses, Engineer has a federal constitutional due process right to a judicial review based on the facts litigated and reflected in the record. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Conclusion

For the reasons set forth herein and in Petitioner's opening brief, The Parsons Corporation and The Ralph M. Parsons Company respectfully request that the decision of

the Alaska Court be reversed and the well-reasoned decision of the Lower Court be followed.

Respectfully submitted,

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Dated May 11, 1993

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APPENDIX

THE SUPREME COURT OF THE STATE OF ALASKA

F.W. WOOLWORTH CO., Appellant, v. STATE OF ALASKA, DEPARTMENT REVENUE, Appellee	File No. 5467 MEMORANDUM OF OPINION AND JUDGEMENT* (No. 101 - October 29, 1981)

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage,
Victor D. Carlson, Judge.

Appearances: Michael D. Bray, New York, Robert L. Eastaugh, Delaney, Wiles, Hayes, Reitman & Brubaker, Inc., Anchorage, for Appellant. Teo C. Spengler, Assistant Attorney General, Wilson L. Condon, Attorney General, Juneau, for Appellee.

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* Entered pursuant to Appellate Rule 214

Before: Rabinowitz, Chief Justice, Connor, Burke and Matthews, Justices, and Dimond, Senior Justice.** (Compton, Justice, not participating.)

In calculating its Alaska income tax liability for 1972-75, Woolworth did not include dividends it received from its foreign subsidiaries. Woolworth's position is that these subsidiaries are not part of the unitary business it conducts in the United States and are thus not part of its income to be apportioned among the states in which it does business. It relies on the United States Supreme Court's decision in Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 63 L. Ed. 2d 510 (1980).

In Mobil, the court upheld apportionment of dividends since it found them to be "derived from a functionally integrated enterprise, "id. at 441, 63 L. Ed. 2d at 523, and the Court said it was the absence of an "underlying unitary business" that would preclude taxation of dividends. Id. at 442, 63 L. Ed. 2d at 524. Like the New Mexico Supreme Court in its recent decision in Taxation and Revenue Dept. v. F.W. Woolworth Co., 624 P. 2d 28 (N.M. 1981),U.S. app. pending, No. 80-1745 (April 17, 1981), we think the Mobil decision holds that the business from which the dividends are derived must be part of the unitary business being taxed in order for the dividends to be apportioned. Exxon Corp. v. Wisconsin Dept. of Revenue, 65 L. Ed. 2d 66, 81 (1980).

**Dimond, Senior Justice, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

While the state has argued that even if this requirement is adopted we can find Woolworth to be engaged in a unitary business with its subsidiaries, we find the evidence in the record on this point to be meager. We therefore deem it appropriate to reverse the superior court's judgement upholding the state's imposition of additional taxes, and to remand the case to that court with directions to remand to the Department of Revenue for a new evidentiary hearing concerning the existence of a worldwide unitary business. In view of this disposition, we decline to reach Woolworth's additional contentions concerning the propriety of the Department's actions.

DEPARTMENT OF REVENUE
STATE OF ALASKA

IN THE MATTER OF	)
	)
F.W. WOOLWORTH COMPANY	)
	)
CORPORATION INCOME TAX	)
	)

STIPULATION FOR ABATEMENT OF DISPUTED TAX LIABILITY

It is hereby agreed by taxpayer F.W. Woolworth Co. (taxpayer), and the State of Alaska, Department of Revenue (department) that

SECTION ONE

STATEMENT OF DISPUTE

1. The subject of this Stipulation for Settlement ("Stipulation") is the assessment of additional state income taxes by the department against taxpayer for the tax years ending December 31, 1972, January 31, 1974 and January 31, 1975.

2. The additional assessment was based on inclusion in taxpayer's income of dividends from its foreign subsidiaries.

3. Revenue Decision 79-34, which upheld the additional assessment, was affirmed by the superior court.

4. In its memorandum of opinion and judgment number 101, dated October 29, 1981, the Alaska Supreme Court reversed the superior court decision and concluded

that dividends received by taxpayer from a foreign subsidiary could only be apportioned for tax purposes if the business of the foreign subsidiary was unitary with the business of the taxpayer in the state.

5. The supreme court directed the superior court to remand the case to the department for further evidentiary hearings on the issue of unity between taxpayer and its foreign subsidiaries.

6. After the remand was made to the department, the United States Supreme Court decided the companion cases of ASARCO v. Idaho State Tax Commission, __U.S. __, 50 L.W. 4962 (June 29, 1982), F.W. Woolworth Co. v. Taxation and Revenue Dept. of New Mexico, __ U.S. __, 50 L.W. 4957 (June 29, 1982).

7. ASARCO held that there must be unity between a taxpayer and its foreign subsidiaries in order to apportion dividend income from those subsidiaries, and Woolworth held that this taxpayer is not unitary with its foreign subsidiaries.

SECTION TWO

TERMS OF SETTLEMENT

1. In light of the decisions in ASARCO and F.W. WOOLWORTH, the department agrees to abate the additional assessment at issue for the tax years ending December 31, 1972, January 31, 1974, and January 31, 1975.

2. This matter will be closed upon payment by the department to taxpayer of $33,811.33 representing the additional assessment plus interest from September 18, 1979 to August 5, 1983. If payment is not made by August 5, 1983, additional interest will accrue at the rate of $8.21 per day from August 5, 1983 until payment is made.

3. The State of Alaska, Department of Law, agrees to pay taxpayer's attorney's fees in the amount of $4,500, plus interest at the legal rate under AS 45.45.010(a) from the date this stipulation is fully executed until payment is made.

4. This stipulation contains the entire agreement between taxpayer and the department, there being no agreement of any kind, verbal or otherwise, which varies, alters or adds to this stipulation.

5. This stipulation is of no force or effect unless approved by both the Attorney General of Alaska, and the Alaska Department of Revenue.

DATED:_____, 1983

Alaska Department of Revenue

By:_____

DATED:_____, 1983

Delaney, Wiles, Moore, Haye & Reitman, Inc. Attorneys for F.W. Woolworth Co.

By:_____

DATED:_____, 1983

Norman C. Gorsuch

Attorney General

By:_____

Martha A. Fox

Assistant Attorney General